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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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**In the Matter of**

**Relicensing of Certain Part 90  
Frequencies to Require Spectrally  
Efficient Use**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**RM-9705**

**Joint Opposition of the Industry Coalition**

Aeronautical Radio, Inc. (ARINC), the Alliance of Motion Picture and Television Producers (AMPTP), the American Automobile Association (AAA), the American Petroleum Institute (API), the American Trucking Associations (ATA), Associated Builders & Contractors, Inc. (ABC), the Association of American Railroads (AAR), the Council of Independent Communications Suppliers (CICS), the Forest Industries Telecommunications (FIT), the Industrial Telecommunications Association, Inc. (ITA), the International Taxicab and Livery Association (ITLA), MRFAC, Inc. (MRFAC), the National Food Processors Association (NFPA), the National Mining Association (NMA), the National Propane Gas Association (NPGA), the National Ready Mixed Concrete Association (NRMCA), the National Utility Contractors Association (NUCA), the New England Fuel Institute (NEFI), the Newspaper Association of America (NAA), the Personal Communications Industry Association (PCIA), the Telephone Maintenance Frequency Advisory Committee (TELFAC), the United Telecom Council (UTC), and the USMSS, Inc. (USMSS) (hereinafter, "the Industry Coalition"), pursuant to Section 1.405 of the Commission's rules<sup>1</sup> and in response to the *Public Notice* released August 24,

<sup>1</sup> See 47 C.F.R. § 1.405 ("Any interested person may file a statement in support of or in opposition to a petition for rule making prior to Commission action on the petition but not later than 30 days after 'Public Notice' is given . . .").

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1999,<sup>2</sup> hereby submit their Joint Opposition to a Petition for Rule Making (Petition), filed by the American Mobile Telecommunications Association, Inc. (AMTA).<sup>3</sup> As demonstrated below, the Petition, which requests that the Commission relocate all private wireless licensees authorized in the 450-470 MHz band to 2 MHz of spectrum and assign the remaining 10 MHz of non-government spectrum through competitive bidding, is substantively untenable, and as such, should be summarily dismissed or denied.

### **I. Introduction**

The Commission currently has before it a Petition for Rule Making submitted by AMTA requesting that the Commission divide all non-public safety pool spectrum in the 450-470 MHz band into a 2 MHz allocation for shared use, relocate all private wireless incumbents to this 2 MHz block, and allocate the remaining 10 MHz of spectrum to be assigned via auctions.<sup>4</sup> According to AMTA, the current regulatory environment for the frequencies in question does not meet the needs of AMTA's membership.<sup>5</sup> To rectify this situation, AMTA suggests that the Commission take "revolutionary action" and reassess the regulatory and licensing framework for the 450-470 MHz band.<sup>6</sup>

As advocates for the private wireless industry, the members of the Industry Coalition have individually been participants in nearly every Commission rule making proceeding -- past and present -- concerning the private wireless industry. The Industry Coalition is concerned that the Petition, if allowed to proceed, would have a devastating

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<sup>2</sup> *Public Notice*, Office of Public Affairs Reference Operations Division Petitions for Rule Making Filed, Report No. 2356 (rel. Aug. 24, 1999).

<sup>3</sup> Petition for Rule Making filed by American Mobile Telecommunications Association, Inc., dated July 30, 1999 (Petition).

<sup>4</sup> Petition at ii.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 2-3.

impact on the private wireless industry. Moreover, the Industry Coalition sees this Petition as nothing more than a thinly veiled attempt by a small contingent of commercial mobile radio operators – the SMR community – to add additional spectrum to their coffers.<sup>7</sup> We find it incredibly presumptuous that the commercial SMR industry would even consider suggesting to the Commission that 2 MHz would be sufficient to satisfy the spectrum needs of the *entire* private wireless industry. This approach is especially troubling – not to mention disingenuous – given AMTA’s previous support for the Land Mobile Communication Council’s (LMCC) request for additional spectrum for private wireless use.

We also take extreme umbrage at AMTA’s cavalier suggestion that “most of their [private wireless] needs would be better served on the type of system that will be deployed by geographic licensees. . . .”<sup>8</sup> As the LMCC clearly demonstrated in its Petition for Rule Making and this industry has often stated in filings before the Commission, commercial providers cannot possibly meet all of the communications requirements of the private wireless industry.<sup>9</sup> Indeed, private wireless communications are generally used for very specific, unique communication needs, such as internal communications among co-workers within a given plant. Commercial providers, on the other hand, offer a variety of services designed to appeal to a broad base of users. As the Wireless Telecommunications Bureau itself acknowledged, “in many cases, PMRS [private mobile radio service] users represent a thin and unique market that CMRS

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<sup>7</sup> AMTA itself acknowledges that its membership consists of specialized mobile radio (SMR) operators and commercial licensees in the 220 MHz and 450-512 MHz bands. Petition at 1.

<sup>8</sup> Petition at 14.

<sup>9</sup> See Petition for Rule Making Submitted by the Land Mobile Communications Council, RM-9267, filed April 22, 1998 (LMCC Petition).

[commercial mobile radio service] providers have little incentive to invest in to serve; there is usually not enough of a return involved to justify the capital investment to serve one or a few PMRS customers.”<sup>10</sup>

In light of the above, the Industry Coalition is compelled to join together in presenting the Commission this opposition to the AMTA Petition.

## **II. Discussion**

### **A. Adoption of AMTA’s proposal would have devastating consequences for the private wireless community.**

AMTA suggests that, to satisfy the short-term spectrum requirements of the private wireless industry, the Commission should restructure the way the existing private wireless spectrum is assigned and utilized.<sup>11</sup> According to AMTA, the way to do this is to relocate all of the private, shared systems to 2 MHz and auction off the remaining spectrum for commercial use. On April 22, 1998, the LMCC filed a Petition for Rule Making explaining the critical need for spectrum in the private wireless industry and requesting an allocation of spectrum for private mobile radio services.<sup>12</sup> To demonstrate the acute need for spectrum by the private wireless community, the LMCC supported that petition with a study of the channels available to a new applicant in the bands most heavily used by private wireless users. According to the study, in each of the top 10 cities, no channels are available for assignment in the 470-512 MHz, the 800 MHz, and the 900 MHz bands.<sup>13</sup> While there is a very limited amount of spectrum available in the 450-470 MHz band, license assignments in these bands are shared –

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<sup>10</sup> *PRMS Land Mobile Services: Background*, Wireless Telecommunications Bureau Staff Paper at 23-24 (rel. Dec. 18, 1996).

<sup>11</sup> Petition at 6.

<sup>12</sup> See LMCC Petition at 1.

<sup>13</sup> See LMCC Petition, Appendices A and B.

resulting in intensive spectrum utilization. They accommodate thousands of private land mobile systems that are integrated into and are indispensable to private wireless operations. It would simply be impossible to accommodate even the incumbent land mobile systems within the 2 MHz of spectrum AMTA would have designated for shared use. Even if relocation were possible, the logistics would be staggering; causing devastating disruptions in service and severe levels of interference as a result of compressing tens of thousands of private wireless communications facilities within a limited amount of spectrum.

AMTA has all but ignored these practicalities as well as the impact of its proposal on the public interest. The frequencies AMTA seeks to set aside for its members accommodate highly important operations across the length and breadth of the U.S. economy. The companies that invest in and deploy private wireless systems are *not* communications companies. They are, among others, construction, educational, trucking, electric, gas and water utility, railroad, newspaper publishing, manufacturing, petroleum, propane, airline, taxicab, automobile emergency, chemical, security, mining, agricultural, wireline infrastructure maintenance, and forest industry organizations; none of which use 450-470 MHz spectrum to provide communications services. Instead, these industries provide the public with a plethora of goods and services that are absolutely essential to the health, welfare, and prosperity of the American public, such as safe land and air transportation, efficient shipment of goods, building supplies, abundant food products, infrastructure development and maintenance, paper products, minerals, emergency road-side service, and wireless communication systems, among others.

Private wireless licensees rely upon their private wireless radio systems to ensure the safety of their employees, enhance their productivity and operations, and contribute to the continued growth and vibrancy of the economy. Many of these systems are frequently utilized to protect the environment, basic infrastructure and the general public. These licensees have unique coverage requirements that do not conform with the geographic license areas typically created by the Commission in order to facilitate auctions.

AMTA's petition is undeniably self-serving, and contrary to the public interest. It should be apparent that by expecting the users of an already congested frequency band to migrate to an even smaller amount of bandwidth, AMTA hopes that these private system operators will choose instead to buy service from AMTA's member companies using the same frequencies from which the users are being forced to migrate. This is certainly not the provision of a "new" service, with allegedly superior public interest benefits. Instead, it involves commercial mobile radio service providers being authorized to present existing private wireless licensees an ultimatum – either migrate into a crowded band with likely interference and inferior coverage, or buy radio service from the commercial provider. If AMTA's proposal were adopted, the Commission would, in essence, be suppressing marketplace choice for no purpose other than to create new business opportunities for AMTA's members. With the amount of competitive alternatives already in the marketplace for commercial wireless services, there is no public policy reason why the Commission should require private wireless licensees to make this Hobson's choice.

As discussed in Section I above and in many other proceedings involving private spectrum use, the critical communication needs of private wireless licensees cannot possibly be fully satisfied by commercial systems. As a result, the public interest would be better served by the continued viability of private systems rather than commercializing the 450-470 MHz band for the benefit of a select group of licensees who are in search of additional spectrum. For ignoring the obvious devastating consequences of its proposal on the public interest, and even the logistical practicalities for implementing that proposal, AMTA's petition is not worthy of serious consideration and should be summarily dismissed.

AMTA's petition should be dismissed for yet another reason. It appears to the Industry Coalition that AMTA is suggesting that, in order to accommodate SMR desires, it would better for the private wireless industry to forego the ongoing transition to new technologies – which was the Commission's primary goal in initiating the "refarming" proceeding – and either bid at auction for spectrum along with telecommunications carriers or purchase service from those same commercial carriers. That would be absurd. The proposal could derail the ongoing transition to demonstrably efficient technologies and the migration now well under way from 25 kHz channels to 7.25 kHz, and even 6.25 kHz channels, a several-fold improvement in spectrum efficiency. As such, AMTA's recommendation lacks perspective, rational underpinnings, and fails miserably as a viable solution to the private wireless industry's spectrum shortage.

**B. There is no mutual exclusivity in the 450-470 MHz band – and the Commission should not entertain proposals for its artificial creation.**

The private wireless industry employs a licensing mechanism that serves to avoid the creation of mutually exclusive license applications. Under current licensing

procedures, private wireless licensees, when licensed on a site-by-site basis and properly coordinated by the Commission's certified frequency advisory committees, do not generate mutually exclusive applications. Instead, the frequency advisory committees "coordinate around" existing licensees through the application of engineering-based frequency selection processes in order to fully maximize use of the private wireless spectrum. Since there is no mutual exclusivity, there is no need for the Commission to employ a licensing mechanism such as auctions to select among competing applicants.

If mutually exclusive applications were to be received by the frequency coordinator – an event that rarely, if ever, occurs – the matter is readily resolved. The first application received is the first application processed, which concludes the matter. The Commission has sustained this process since 1986 and we see no justification for modifying these procedures in order to accommodate the commercial SMR industry's desire for additional spectrum.

**C. AMTA's proposal violates the Commission's Section 309(j)(6)(E) obligations.**

AMTA's Petition suggests that the Commission should reconfigure the 450-470 MHz band to make approximately 2 MHz of the spectrum in this band available for licensing on a shared basis and the remaining 10 MHz of non-public safety pool spectrum available on a geographic basis to be licensed via competitive bidding.<sup>14</sup> Adoption of this proposal would violate both the spirit and the letter of the law.

The Commission is permitted to use competitive bidding to assign licenses *only* so long as such action is consistent with the provisions of Section 309(j)(6)(E). Section

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<sup>14</sup> Petition at 13-14.

309(j)(6)(E) requires the Commission to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity.<sup>15</sup> In the Balanced Budget Act of 1997,<sup>16</sup> the Congressional framers took great care to emphasize the Commission's Section 309(j)(6)(E) obligations:

*If consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . .*<sup>17</sup>

To further clarify their intent, the Conferees, in the Conference Report accompanying the Budget Act, stated:

Notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.<sup>18</sup>

Congress' intent is very clear. Before using competitive bidding as a licensing mechanism, the Commission must first consider ways to avoid mutual exclusivity. AMTA's proposal to impose geographic area licensing on the bands currently occupied by the private wireless community clearly violates the Commission's Section 309(j)(6)(E) obligations. If the Commission adopts this licensing approach, it will create mutual exclusivity among private wireless licensees where it would otherwise not exist. This is in direct and flagrant violation of the Commission's Section 309(j)(6)(E) obligations.

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<sup>15</sup> See 47 U.S.C. § 309(j)(6)(E).

<sup>16</sup> The Balanced Budget Act of 1997, Pub. L. No. 105-33, Title III, Stat. 251 (1997)(Budget Act).

<sup>17</sup> 47 U.S.C. § 309(j)(1) (emphasis added).

<sup>18</sup> H. Rept. 105-217, at 572 (1997).

**D. There is additional spectrum currently available for commercial use.**

Rather than targeting the heavily encumbered spectrum in the 450-470 MHz band for commercial use, it would seem more prudent for the commercial mobile radio industry represented by AMTA to seek an allocation in the 746-764 MHz and 776-794 MHz bands (hereinafter the "746-806 MHz band"). The Commission, in response to the Budget Act, recently released a *Notice of Proposed Rule Making* which sought comment on the new service rules for the licensing of the 746-806 MHz band.<sup>19</sup> The Budget Act requires that the Commission assign 36 MHz of spectrum in the 746-806 MHz band for "commercial use" and assign these licenses via competitive bidding.

Instead of attempting to create a dubious spectrum opportunity from within the extremely congested 450-470 MHz band, it would be more appropriate for the "SMR-oriented" commercial mobile radio service industry to expend their resources and energy on convincing the Commission that they should receive an allocation from the 36 MHz already targeted for commercial use in the 746-806 MHz band. The Industry Coalition recognizes that the majority of the traditional SMR industry is precluded from expansion in the 800 MHz band due to the fact that a single licensee won ninety-five percent of the licenses in the 800 MHz auction. In light of this occurrence, this industry, much like all other licensees, desires additional spectrum.

The Industry Coalition acknowledges and understands the justifiable frustration of the SMR industry over the lack of available spectrum for expansion. After all, the private wireless industry itself filed a Petition for Rule Making requesting an allocation of

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<sup>19</sup> See In the Matter of Service Rules for the 746-764 and 776-794 Bands, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rule Making*, WT Docket 99-168, FCC 99-97, released June 3, 1999.

spectrum for private wireless use.<sup>20</sup> Accordingly, the Industry Coalition believes that it would be a better use of AMTA's – as well as the Commission's – time and resources to focus on the currently available spectrum in the 746-806 MHz band, rather than seeking to usurp spectrum that already is being used by the private wireless community. Towards that objective, the Industry Coalition suggests that AMTA continue to pursue its request for an allocation for "specialized commercial wireless systems" in WT Docket 99-168.<sup>21</sup>

### **III. Conclusion**

Because the Petition is substantively untenable, it should be dismissed. AMTA has failed to produce even a scintilla of evidence that would warrant overturning the Commission's previous decision to allocate the 450-470 MHz band for private wireless use. The only rationale AMTA offers is to suggest that the Commission should promote spectrum efficiency in this band by allowing a select group of licensees – the SMR community – to purchase this spectrum at auction. This certainly is insufficient justification for reconsideration of a long-standing frequency allocation, the monumental investment made in the private systems authorized to use this spectrum, and the efficiencies gained by the shared use of the spectrum. Moreover, the Industry Coalition has presented a viable alternative to the spectrum needs of the SMR community, *i.e.*, the 36 MHz of spectrum currently under review in the 746-806 MHz proceeding.

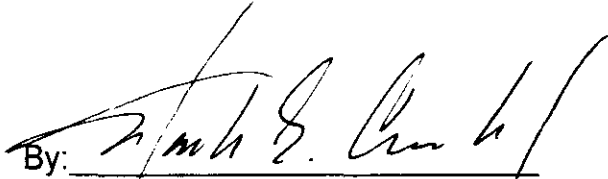
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<sup>20</sup> LMCC Petition at 1.

<sup>21</sup> We note that AMTA has already suggested an allocation for "specialized commercial systems" in the 746-806 MHz proceeding. See *generally* AMTA Comments.

Accordingly, the Commission should summarily dismiss AMTA's petition.

Respectfully Submitted,

By:   
Mark E. Crosby  
On behalf of **The Industry Coalition**

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September 23, 1999

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I, Laura L. Smith, do hereby certify that on the 23th day of September 1999, I forwarded to the parties listed below a copy of the foregoing Joint Opposition of the Industry Coalition by first-class mail, postage pre-paid:

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